

July 23, 2020

To: EPA Region 8: Jesse Avila, Jennifer Chergo, Stephen Wharton, Betsy Smidinger

From: Fran Aguirre, Administrator, VB/ I-70 Community Advisory Group

RE: Request for Clarification, Institutional Controls In OU1, Vasquez Bl./ I-70 Superfund Site

Dear Friends:

Issue:

In 2019, ten years after it was recognized by EPA, that Institutional Controls (IC) were necessary to protect human health in Operable Unit 1 of the Vasquez Bl./I-70 Superfund Site, by notifying potential buyers of properties that had not been tested or cleaned up of contamination from lead and/or arsenic, that they may be assuming liability and health risks for an unremediated property, it was discovered that the IC were not working as planned and potential buyers were not being notified of the IC before a purchase was consummated, because the Denver Clerk and Records office filed the IC notices under the property owners' names, not the addresses.

Requests:

The CAG requests that the EPA explain, in writing, (1) how such a mistake happened, (2) what EPA is doing to notify current and potential property owners of the error and (3) what are the plans to fix the problem with the Denver Clerk and Recorder.

Invitation:

The EPA is always welcomed and encouraged to attend regularly scheduled CAG monthly meetings (third Tuesday of each month) in order to facilitate the CAG's full participation in all EPA work at the site per EPA guidelines for Community Advisory Groups, so the the CAG can fully discharge its Congressionally mandated duty to fully inform the community of progress at the site and to relay community feedback to the EPA.

We invite the EPA to send representatives to the August 18, 5:30PM, Virtual CAG meeting to update and discuss with the CAG, work ongoing in OU2 and OU3 and to address the requests above. Meeting details and links will be published in the regular CAG Newsletter.

(Please find relevant excerpts from the 2009 First five Year Review of VB/I-70, the 2014 Second Five Year Review of VB/I-70, the 2014 Explanation of Significant Differences and the 2019 Third Five Year Review of VB/I-70 after the Summary below.)

A Summary of Findings

Beginning in 2009, all of the cited documents recognize the need for IC for OU1 in VB/I 70, to protect human health. It is well documented that many of the properties (exact number of impacted properties varies depending on the source of information) were either not tested for lead and arsenic contamination or were tested and found to be contaminated at levels above EPA action levels of 400 ppm for lead and 70 ppm for arsenic but they were not remediated because, in both cases, the owners refused to allow EPA access to their properties.

The 2009 Review noted:

“A review of the title records for the properties where soil was not sampled, and the properties where soil contamination above soil action levels was not removed, indicates that property transfers are occurring. But there is no process currently in place to notify these new property owners of possible contamination on their properties. Because institutional controls are now necessary, and because the ROD does not include these institutional control requirements, the conclusion of this FYR is that the remedy is not functioning as intended by the decision documents.” ____ First five Year Review 2009

The 2009 Review recommended ICs:

- Issuance of an annual notice letter to the resident stating that the property was part of the VB /I-70 Superfund Site and the property had not been properly evaluated or remediated.
- Annotation of the unevaluated or unremediated properties in the City of Denver’s overlay district that identifies properties with environmental concerns. This would notify anyone seeking a building permit on the property.
- Placement of a notice on the land use record (title), stating that the unevaluated or unremediated property was part of the VB/I-70 Superfund Site and was not properly evaluated or remediated because the homeowner of record refused or did not respond to multiple requests by EPA for access. This institutional control is designed to notify potential buyers of the environmental issues at the property.”

The Second Five Year Review and Explanation of Significant Differences (both in 2014) and the 2019, Third Five Year Review, all recognized the need to notify potential buyers that they may be buying a contaminated property and they may be liable for testing and clean up since the EPA decided that it would not be cost effective for them to extend their responsibility for these functions post 2014. In 2019, *ten years* after it was recognized by EPA that IC were necessary to protect human health, it was discovered that the ICs were *not working* as planned because the Denver Clerk and Records office file the notices under the property owners’ names, not the addresses :

“On July 2, 2019 EPA talked with staff at Denver’s Office of the Clerk and Recorder about the individual Notice of Environmental Conditions and Notice of Potential Environmental Conditions that were placed on individual properties. This discussion resulted in determining that everything in the Denver property database is indexed by name, not by property address or property parcel. Companies searching for information must provide an owner name to find information. Even liens to the deed are searched by the name. After researching properties that have had an owner change since the institutional control was filed it became clear that the new property record with the new owner does not link back to the original institutional control on the property. Therefore, new owners of properties may not get the needed information regarding the institutional controls on the property.”

____Third Five Year Review

Since 2009, whenever title searches have been done as a part of a sales transaction, the IC potentially never showed up. Some buyers never knew they were buying a part of an unremediated

superfund site even though the EPA recognized in 2009 the need for such notice to protect human health and we assume, to warn potential buyers of liability for clean up of contamination.

Solution date 2021: The EPA is giving themselves until September 30, 2021, 12 years after ICs were recommended, to come up with a solution for this problem.

Excerpts from EPA Reports pertaining to IC, VB/I-70, 2009 - Present

First Five Year Report 9/30/2009ⁱ

EPA Region 8, First Five Year Review Report for Vasquez Boulevard, I-70 Superfund Site Denver County, Colorado. By Carol L. Campbell, Assistant Regional Administrator Office of Ecosystems Protection and Remediation, by Carol L. Campbell, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation.

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"4.4 Institutional Controls

The Remedial Action Report (EPA 2008) indicated that, of the 4,470 residential properties within the site boundaries, 155 residential properties were not sampled and 33 residential properties identified as requiring clean-up were not cleaned up because the homeowner did not provide access to EPA despite contacting the homeowner numerous times. To ensure that future residents at these unaddressed properties are aware of the potential or actual soil contamination, EPA, the City and County of Denver and CDPHE need to implement institutional controls (EPA 2008).

The following institutional controls have been proposed, but no decision document has been signed, and institutional controls have not been implemented:

- Issuance of an annual notice letter to the resident stating that the property was part of the VB /I-70 Superfund Site and the property had not been properly evaluated or remediated,
- Annotation of the unevaluated or unremediated properties in the City of Denver's overlay district that identifies properties with environmental concerns. This would notify anyone seeking a building permit on the property, and
- Placement of a notice **on the land** use record (title), stating that the unevaluated or unremediated property was part of the VB/I-70 Superfund Site and was not properly evaluated or remediated because the homeowner of record refused or did not respond to multiple requests by EPA for access. This institutional control is designed to notify potential buyers of the environmental issues at the property."

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7.1 "Question A: Is the remedy functioning as intended by the decision documents?

No.

Review of the Remedial Action Report (EPA 2008) and supporting documentation indicates that the OU1 remedial action for residential properties that received soil removal work because of concentrations above action levels has been completed. The remedy for those properties is functioning as intended by the ROD requirements. The remedy involved physical soil removal from 800 properties and replacement with clean soil backfill. Therefore, it can be concluded that soil cleanup levels have been achieved on these properties. How-

ever, 33 properties with soil contamination above action levels have not been remediated, and 155 properties were not sampled for contaminants during the remedial action, because of access issues with the property owners.

The denial of access to these properties for remedy implementation has implications on assessing the protectiveness of the remedy, and has necessitated the consideration of institutional controls for these properties. At the time of this FYR, institutional controls are being evaluated for those properties where remedial investigations and/or remedial actions were not performed (EPA 2008). These institutional controls could be administered by the City and County of Denver and would likely include notification of property owners that their property is within the VB/I-70 Superfund Site. Denver may also make annotations to property records that it maintains, to reflect that possible environmental contamination may exist on the property. However, because the ROD did not address institutional controls, and these institutional controls are not yet in place, the possibility of exposure to contamination above the risk-based cleanup levels exists for these properties. A review of the title records for the properties where soil was not sampled, and the properties where soil contamination above soil action levels was not removed, indicates that property transfers are occurring. But there is no process currently in place to notify these new property owners of possible contamination on their properties. Because institutional controls are now necessary, and because the ROD does not include these institutional control requirements, the conclusion of this FYR is that the remedy is not functioning as intended by the decision documents.

There are no long-term operation and maintenance activities associated with OU1 because the contaminated soils were disposed at the Globe Site. It is understood that soils from OU1 have been incorporated with residential soils removed from the Globe Site. Therefore, the operation and maintenance requirements for the OU1 soils will be evaluated as part of the FYR for the Globe Site. There are also no opportunities for optimization because the physical remedy has been completed.”

Explanation of Significant Differences 9/30/2014ⁱⁱ

Explanation of Significant Differences, Operable Unit 1, Vasquez Boulevard /Interstate 70 City and County of Denver, Colorado. By Martin Hestmark, Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, U.S. EPA, Region 8.

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“There are presently 69 residential properties within OU1 where contaminated soils exist or may exist above levels that allow for unlimited use and unrestricted exposure to the soil. It is not cost effective for the EPA to keep open the option for sampling and cleanup for these properties into the indefinite future. Thus, the EPA will not be providing sampling or cleanup under the ROD after the date of this ESD. However, for the remedy to be protective an institutional control is needed for these properties.

The ROD provided an informational institutional control through the community health program. The community health program ended in 2008 when the EPA intended to end the soil sampling and removal components of the remedy. The EPA explored a range of options with the State of Colorado and the City and County of Denver regarding the best approach for implementing institutional controls at the unaddressed properties. Re-establishing the community health program was considered, as was use of the State Environmental Covenant and Notice of Environmental Use Restrictions law. Since the number of properties involved is small, it was recommended that informational institutional controls directed at these specific properties in the form of a letter to property owners and a notice tied to the property address be implemented rather than more restrictive or broader institutional controls. As a result, this ESD adds informational institutional controls in the form of a notice of environmental conditions (Notice) and an annual informational letter (Letter) for each unaddressed property as part of the OU1 remedy for the Site.

The Notice would be filed with the City and County of Denver Clerk and Recorder's office on each unaddressed property and the Letter would be sent annually to each owner of record, as well as to the property

address to ensure that any tenants would be aware of the potential for soil contamination and to provide information on how to minimize the potential for exposure to potentially contaminated soil.

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Because this remedy will result in hazardous substances, pollutants, or contaminants remaining on site above levels that allow for unlimited use and unrestricted exposure, a statutory review will be conducted no less often than each five years after the initiation of the remedial action to ensure that the remedy is, or will be, protective of human health and the environment.

Second Five year Report 9/30/14 ⁱⁱⁱ

Second Five-Year Review Report, Vasquez Boulevard / I70 Superfund Site, city and County of Denver, Colorado, CERCLIS IS: COD002259588 by Martin Hestmark, Assistant Regional Administrator, Office of Ecosystem Protection and Remediation.

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Institutional Controls

Institutional controls were implemented in June and July, 2014 for 69 residential properties within OU1 where the property owner denied EPA access to sample and/or remove soil. The ICs were incorporated into the OU1 remedy by signing of the ESD. The IC for OU1 is an informational IC made up of two parts. The first part is either a Notice of Potential Environmental Conditions, for residential properties where EPA has not sampled, or a Notice of Environmental Conditions for properties where EPA has sampling results showing lead or arsenic levels above the action levels established in the ROD but where cleanup has not been conducted. These notices are filed with the City and County of Denver Clerk and Records Office in the title records and serve to notify present, prospective, and future owners of the potential for elevated levels of lead or arsenic in the properties' soils. The second part of the informational IC for OU1 is an informational letter that will be sent annually to the owner of record and to the property address to make sure that any tenants are informed. This annual informational letter provides the specific information EPA has on the property and provides information on how to minimize exposure to potentially contaminated soil.

5.0 PROGRESS SINCE THE LAST FIVE-YEAR REVIEW

This is the second five-year review for the site. Since the first FYR in 2009, the EPA has addressed the recommendations (shown in the table below) [See First Five Year Review, page 12] for follow-up actions identified in the first FYR by implementing institutional controls and issuing an Explanation of Significant Differences (ESD).

ICs were implemented in June, 2014, when EPA filed either a Notice of Environmental Conditions or a Notice of Potential Environmental Conditions in each properties' title file at the City and County of Denver Clerk and Recorder's Office for 69 unaddressed properties. A copy of the filed notice was sent to the property owner of record. The annual informational letter will be sent to each owner as well as to the property address starting in January of 2015. The ICs implemented at OU1 were incorporated into the OU1 remedy by signing of the ESD in September, 2014.

Third Five-Year Review Report for Vasquez Boulevard and I-70 Superfund Site, Denver, Colorado, by Betsy Smidinger, Director, Superfund and Emergency Management Division

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Institutional Control (IC) Review

In 2014 and 2015, EPA implemented institutional controls for 72 residential properties in OU1 where the property owner denied EPA access to sample and/or remove soil. EPA filed a Notice of Potential Environmental Conditions for residential properties where EPA never sampled and a Notice of Environmental Conditions for properties where soil removal was not conducted even though it was determined to be necessary based on EPA's soil sampling results for lead and/or arsenic. These notices are filed with the City and County of Denver Office of the Clerk and Recorder in the title records and serve to notify present, prospective and future owners and current residents of the potential for elevated levels of lead or arsenic in the properties' soils. In addition, the 2008 Land Use Control Implementation Plan (LUCIP) is also in place across the City of Denver. The LUCIP requires that the City of Denver provide CDPHE with information on when a building permit is pulled under the city and county of Denver building permit program within the boundaries of a Superfund Site. When this happens for properties at this Site, EPA is notified and provides the prospective builder with information about potential risks at that property. During the FYR period, the EPA RPM was notified several times of this occurrence and provided information to property owners or current residents specific to their situation. In most cases, the properties were determined to not have lead and/or arsenic levels above residential use standards and as a result no additional response action required. **Beginning in 2018, EPA began referring these individuals to CDPHE as part of ongoing O&M.**

In October 2014, EPA filed a Withdrawal Notice to remove the Notice of Potential Environmental Conditions/ Notice of Environmental Conditions on 17 properties where ICs were in place but are no longer needed. Three of these 17 properties were remediated in 2008, so the Notice of Environmental Conditions was no longer required. For the remaining 14 properties, in 2014 the owners agreed to give EPA access to sample and/or clean up their properties. EPA conducted sampling at these properties from July through September 2014. Based on the sampling results, three of the 14 properties required cleanup, which was completed by October 2014. After these three properties were cleaned up, EPA filed a Withdrawal Notice on each of the 14 properties. These actions resulted in the 2017 Remedial Action report indicating there were 55 properties with ICs. However, after that report was issued, EPA filed withdrawals for two additional properties on September 12, 2017 leaving 53 properties with individual notices.

On July 2, 2019 EPA talked with staff at Denver's Office of the Clerk and Recorder about the individual Notice of Environmental Conditions and Notice of Potential Environmental Conditions that were placed on individual properties. This discussion resulted in determining that everything in the Denver property database is indexed by name, not by property address or property parcel. **Companies searching for information must provide an owner name to find information. Even liens to the deed are searched by the name. After researching properties that have had an owner change since the institutional control was filed it became clear that the new property record with the new owner does not link back to the original institutional control on the property. Therefore, new owners of properties may not get the needed information regarding the institutional controls on the property.**

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Implementation of institutional controls at residential properties where sampling and/or soil removal was not consented to by the property owners notifies present property owners and current residents of the contaminated soils or potentially contaminated soils at the property. However, because these notices are filed by

owner name and may not be found when doing a record search in Denver's property database, new owners of these properties may not receive the institutional control information during the real estate transaction, preventing them from making an informed decision on the property they are buying. EPA is investigating ways to improve the institutional controls on these properties.

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The Milestone Date for rectifying the problem with the Institutional Controls with the Clerk and Recorder of Denver (Issue: Some institutional controls were filed by property owner name and may not be found during property record research in Denver.) until 9/30 2021.

cc: CDPHE: Fonda Apostolopoulos, Jeanine Natterman, Laura Dixon, Tracie White

Denver Clerk and Recorder: Paul Lopez

Denver City Auditor: Timothy O'Brien

ⁱ <https://semspub.epa.gov/work/08/1118472.pdf>

ⁱⁱ <https://semspub.epa.gov/work/08/1552122.pdf>

ⁱⁱⁱ <https://semspub.epa.gov/work/08/1771624.pdf>

^{iv} <https://semspub.epa.gov/work/08/100006901.pdf>